Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOHN TIMBERS,

Petitioner,

v.

STATEWIDE GRIEVANCE COMMITTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the failure of the Presentment to allege the grounds on which the Rule 1.4 part of the Decision is based—so the Petitioner had no opportunity to address these grounds at trial and, indeed, unknowingly and unwittingly gave the testimony on which one of the new grounds is based—violate the due process clause of the Fourteenth Amendment to the United States Constitution?

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PRELIMINARY STATEMENT

Petitioner, John Timbers, respectfully requests that a writ of certiorari issue to review a ruling of the Connecticut Supreme Court.

The ruling denied the Petitioner's Petition For Certification to review an opinion of the Connecticut Appellate Court.

The Appellate Court affirmed a decision of the Connecticut Superior Court (for the Judicial District of Stamford/Norwalk) that suspended the Petitoner from the practice of law for six months for violating Rules 1.4 and 1.5(c) of the Rules of Professional Conduct.[1]

OPINIONS BELOW

The order of the Connecticut Supreme Court, officially released on July 11, 2002 and denying the Petitioner's Petition For Certification, is reported at 261 Conn. 908, 804 A.2d 214 and appears in Appendix D, hereto.

The opinion of the Connecticut Appellate Court, officially released on May 21, 2002, is reported as *Statewide Grievance Committee v. John Timbers*, 70 Conn. App. 1, 796 A.2d 565 (2002) and appears in Appendix C, hereto.

The opinion of the Connecticut Superior Court, dated August 2, 2002, is not reported, but appears in Appendix B, hereto.

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1. The Connecticut state courts have adopted The Rules Of Professional Conduct to govern the conduct of Connecticut attorneys.

STATEMENT OF JURISDICTION

The order of the Connecticut Superior Court denying the Petitioner's Petition For Certification was officially released on July 11, 2002. This Court has jurisdiction to review this order by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES OF PROFESSIONAL CONDUCT INVOLVED

A. Constitutional Provisions

Amendment 14, United States Constitution

Section 1.... No State shall ... deprive any person of life, liberty, or property, without due process of law....

B. Rules Of Professional Conduct

Rule 1.4. COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a mattter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

and

Rule 1.5. FEES

* * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered. . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages of the recovery that shall accrue to the lawyer as a fee in the event of settlement, trial or appeal, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

* * * *

STATEMENT OF THE CASE

The Facts

In 1990 the Petitioner (an attorney licensed to practice in Connecticut [and other jurisdictions]) agreed to work with another attorney (Kevin McGovern, Esq.) who was already representing a small Connecticut company, named Lukken Color Corporation, in a patent/trade secret litigation against the Valspar Corporation, a large paint manufacturer.

McGovern had previously entered into a written fee agreement with Lukken whereby Lukken paid for work done in the matter on an hourly basis. When the Petitioner agreed to work on the Lukken-Valspar litigation, he and McGovern conferred and agreed (with Lukken's consent) that the Petitioner would submit his time to McGovern; McGovern would include this time in the bills he submitted to Lukken; and McGovern would pay the Petitioner (out of the payments Lukken made to McGovern).

The litigation was complicated, hard fought, and conducted before six tribunals in two states (and the District of Columbia). The principal cases were: (1) a lawsuit by Valspar against Lukken in the Minnesota state courts seeking a declaratory judgment as to a series of disclosure/ confidentiality agreements that Valspar, and a predecessor corporation, had made with Lukken; and (2) a patent infringement lawsuit by Lukken against Valspar in the Connecticut federal court.

In the spring of 1991, Lukken told McGovern it couldn't afford to continue paying McGovern on an hourly basis. In a series of meetings attended by Lukken (i.e., Mr. Ivan Mahoney,

Lukken's Chairman and Secretary, and Ms. Veva Crozer, Lukken's President), the Petitioner, McGovern, and others, it was agreed that the McGovern office would drop out of the litigation; the Petitioner would be in charge of the litigation; and that, thenceforth, the Petitoner's fee would be one-third of any recovery by Lukken in the patent case.[2]

However, because of the press of other matters (including developments in the Valspar-Lukken litigation), the Respondent did not have Lukken execute a new writing documenting this change.[3]

The Petitioner kept Lukken fully advised of everything that was happening (in all parts of the litigation).

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2. The Superior Court Decision says that, in addition to the $80,795 fee the Petitioner received in the spring of 1995 when the Lukken-Valspar litigation was settled, "Lukken had previously paid the . . . [Petitioner] approximately $11,000 in legal fees". (Decision, par. 11) The "approximately $11,000" were fees the Petitioner received through McGovern, before 1991 when McGovern dropped out, for representing Lukken in the Minnesota Case, in which Lukken was a defendant. The 1991, one-third, contingent fee agreement was for the Connecticut patent infringement case in which Lukken was a plaintiff.

3. Contrary to what the Superior Court Decison says (at paragraph 7), the undisputed evidence was that, while the Petitioner was representing Lukken, the Petitioner never intended to charge more than the one-third fee that was discussed at these meetings. The only claim that the Petitioner changed his mind was the claim in the Presentment that (as detailed in footnote 4, *infra*) was based on a 1997 telephone conversation that took place two years after the Petitioner stopped repesenting Lukken.

Even then, (as shown in footnote 4, *infra*) there is no merit to the claim based on the 1997 conversation, and the Superior Court Decision rejects that claim.

In the fall of 1994 Lukken's Mahoney told the Petitioner that Valspar had offered to settle the litigation by paying Lukken $330,000. Mahoney said he wanted to accept the offer.

In the course of the discussions with Lukken that followed, the Petitioner and Mahoney had a meeting in November 1994 at which they discussed the specifics of the Petitioner's fee under the settlement offer. They agreed that their 1991 conversations called for reimbursing Lukken (for the disbursements it had paid) and the Petitioner (for the disbursements he had paid, but hadn't been reimbursed for). After this was done, the Petitioner would receive one-third of what was left, and Lukken would receive the other two-thirds. (Although the precise amount of the disbursements hadn't been calculated, this would mean the Petitioner's fee would be approximately $100,000.)

However, following the conference, Mahoney stopped communicating with the Petitioner. Instead, Mahoney had the law firm that had prosecuted Lukken's patent application do the settlement papers (on the Lukken-Valspar cases on which the Petitioner was representing Lukken). Mahoney didn't tell the Petitioner the date or details of the settlement. And Mahoney wouldn't respond to the Petitioner's telephone calls and faxes.

Finally, when the Petitioner was able to get through to Mahoney, in March 1995, Mahoney admitted that the Valspar-Lukken settlement had closed in January 1995, and that Lukken had received the proceeds of the settlement. However, Mahoney said he wouldn't pay the Petitioner his fee because Mahoney didn't have the numbers showing the Respondent's disbursements.

The Petitioner immediately started to assemble the disbursement numbers. However, a day or two later, before the Petitioner could complete the task, when the Petitioner returned from lunch, the Petitioner's receptionist said a man had delivered an envelope for the Petitioner.

When the Petitioner opened the envelope, he found a Lukken check in the amount of $80,795 (i.e., approximately $20,000 less than the fee Lukken and the Petitioner had agreed to). The check also contained restrictive words on the back that, if the Petitioner endorsed the check for payment, would say the Petitioner acknowledged that the check was in full payment of his fee for his work on the Lukken-Valspar litigation.

The Petitioner telephoned Mahoney and protested. He said the check was contrary to the one-third fee to which Lukken and the Petitioner had agreed. The Petitioner suggested that Lukken and the Petitioner agree that the Petitioner could cash the $80,795 check (because both Lukken and the Petitioner agreed the Petitioner's fee was at least that much), and that they should submit the question of whether the Petitioner should receive the other approximately $20,000 (to which the Petitioner was entitled under the one-third fee) to fee arbitration. The Petitioner explained that he needed the $80,795 immediately. Mahoney refused. He said the only way the Petitioner could get the $80,795 would be to sign away the other $20,000 of his fee.

The Petitioner researched the law of duress. From that research it appeared that Lukken's actions (i.e., refusing to pay the Petitioner the $80,795 it conceded it owed the Petitioner unless the Petitioner gave up the other $20,000 of his 1/3 fee) constituted illegal duress.

Accordingly, the Petitioner endorsed and cashed the check.

Aproximately twenty-one months later, in December 1996, the Petitioner sued Lukken, to recover the approximately $20,000 of the one-third fee that Lukken had refused to pay. *John Timbers v. Lukken Color Corporation*, CV-96-0156079-S (Conn. Superior. Ct.: Stmfd/Nwlk J.D.) (the "*Timbers v. Lukken* Case") The Petitioner's objective was to obtain a quick settlement for that amount. When Lukken refused to settle, the Petitioner didn't prosecute the case, and, in due course, the case was dismissed pursuant to the Connecticut Superior Court's dormancy dismissal program.

Prior Proceedings

As part of Lukken's response to the *Timbers v. Lukken* Case, Lukken filed a grievance against the Petitioner on January 9, 1997. Two years later, the Statewide Grievance Committtee issued an (undated) decision saying the matter should be presented to the Superior Court.

In April 1999 the Grievance Committee filed a presentment in the Superior Court.

After a trial, the Superior Court (Karazin, J) entered a Memorandum of Decision (dated August 2, 2000) that held the Petitioner had violated Rules 1.5(c) and 1.4 of the Rules of Professional Conduct; ordered the Petitioner suspended for six months; and required that the Petitioner apply for readmission.

The Petitioner appealed to the Connecticut Appellate Court, which affirmed.

The Petitioner then filed a Petition For Certification, asking the Connecticut Supreme Court to review the case. The Connecticut Supreme Court denied the Petition.

REASONS FOR GRANTING THE PETITION

I.

The Decision Below Turns On Charges That Were Not Alleged In The Presentment; That Are Wrong; But That The Petitioner Didn't Have An Opportunity to Respond To; And, Indeed, Unknowingly And Unwittingly Gave Answers To Questions By The Court That Turned Out To Be Evidence On Which One Of The New Grounds Is Based—Because The First Time The Charges Were Raised Was In The Superior Court's Decision. The Failure Of The Connecticut Supreme Court To Reverse On This Ground Is In Direct Conflict With This Court's Decision In *In Re Ruffalo*, 390 U.S. 544 (1968).

The result below is in direct conflict with this Court's decision in *In re Ruffalo*, 390 U.S. 544 (1968). In *Ruffalo* the Supreme Court reversed a grievance sanction because that sanction was based on a ground that wasn't alleged in the charging document.

The same thing happened in this case.

Thus, the Presentment in this case alleged:

> (1) The Petitioner violated Rule 1.5(c) (which requires that a lawyer's fee agreement be in writing) because the Petitioner's fee agreement wasn't in writing (Presentment, pars. 8 and 17);

> (2) the Petitioner violated Rule 1.4 (which requires that a lawyer communicate with his client) because *the Petitioner didn't tell his clients he had changed his fee so the fee was "approximately half a million dollars" more than the agreed to fee.* (Presentment, pars. 7, 9, 10, 15 and 16: emphasis added); and
>
> (3) "approximately half a million dollars in additional legal fees" was unreasonable, in violation of Rule 1.5 (Presentment, par. 17).

(A copy of this Presentment appears at Appendix A, hereto.)

At trial, the Petitioner did not seriously dispute that there had been no written fee agreement. However, the universal penalty for such an offense (under Connecticut precedents, the ABA Standards For Imposing Lawyer Sanctions, and the law of every jurisdiction that has addressed the matter) is a reprimand—or less.

The Grievance Committee could have imposed a reprimand without referring the matter to the Superior Court. Therefore, the main issue at trial was whether the Petitioner did more—by violating Rule 1.4 (and Rule 1.5) by increasing his fee, by "approximately half a million dollars" without telling his clients.

The only evidence introduced to support this charge was the complaint with which the Petitioner started the *Timbers v. Lukken* case and (the Grievance Committee's interpretation of) a telephone conversation that took place shortly after the complaint was filed in 1997—more than two years after the Petitioner's representation of Lukken had ended. (As detailed

in the accompanying footnote[4]) the trial focused on the Grievance Committee's claim that the telephone conversation showed the Petitioner had changed his position on his fee, to seek "approximately half a million dollars" more than the agreed to fee.

As the Petitioner reads the Decision, the trial judge agreed with the Petitioner's showing.[5]

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4. In 1997, Lukken's new lawyer (in the *Timbers v. Lukken* Case) telephoned the Petitioner to discuss settlement of that Case. At the trial below, the Grievance Committee claimed that the Petitioner's answer, to the new lawyer's question about how much the Petitioner was seeking in the Case, showed the Petitioner had changed his position on his fee. The Petitioner disputed this, showing that: because the Petitioner was making other claims in the *Timbers v. Lukken* complaint, in addition to failure to pay the Petitioner's fee, the amount sought in the *Timbers v. Lukken* Case didn't necessarily match the Petitioner's fee; even if the Petitioner's answer had only referred to the quantum meruit allegations in the *Timbers v. Lukken* complaint, as the Committee's argument assumed, the Petitioner was compelled to sue on a quantum meruit theory by the law of Connecticut which, at the time, only allowed a quantum meruit recovery when there was no written fee agreement; that such an answer couldn't be a Rule 1.4 failure to communicate because the answer was a communication; and, in any event, the conversation about settlement was a privileged communication that should not be the ground for a grievance sanction.

(Because the Petitioner did a great deal of work on the Lukken-Valspar litigation, a quantum meruit theory gave a higher number than one-third of the relatively small $330,000 Lukken chose to settle the litigation for.)

5. For the most part, the Decision says nothing about this Grievance Committee claim—which is how the Decision disposes of other Grievance Committee claims with which the trial court did

(Cont'd)

Nonetheless, the Decision holds the Petitioner violated Rule 1.4—but on new grounds that weren't alleged in the Presentment (and weren't tried at the trial):

> 16. The court finds that the failure to keep Lukken Color Corporation reasonably informed about the status of his fees in this matter constituted a violation of rule 1.4 of the rules of professional conduct. It is clear from the time that Mr. Timbers undertook the services *he did not confer concerning the fee. He did not do a written fee agreement. He did no billings.*

(Decision, par. 16: underlining added to each of the new Rule 1.4 grounds)

On his appeal the Petitioner demonstrated that these grounds for the Rule 1.4 part of the Decision had not been alleged in the Presentment; and argued that punishing the Petitioner for things that weren't alleged in the Presentment violated constitutional due process. He demonstrated that failure to allege the new grounds was especially unfair because they were wrong—and that he would have been able to show this if he had been given notice of the charges.[6]

(Cont'd)

not agree—instead of rejecting the claims outright. However, paragraph 15 of the Decision does appear to agree with the Petitioner's explanation (described in the preceding footnote) of the part of his telephone conversation answer that dealt with the quantum meruit allegations in the *Timbers v. Lukken* complaint.

6. The operative part of the Connecticut Appellate Court opinion says everything the Superior Court did was "well within the court's discretion". Of course, failure to give the Notice required by constitutional due process and this Court (in *In re Ruffalo*) is an error

(Cont'd)

In *In re Ruffalo*, *supra*, this court held that a similar change (from what was charged at the beginning of a grievance proceeding to what the decision held) deprived that attorney of due process.

Thus, in *In re Ruffalo* the charging document, in a proceeding before the Ohio Board of Commissioners on Grievances and Discipline, charged, in relevant part, the attorney solicited FELA plaintiffs through a part-time employee named Michael Orlando. Orlando's full-time employer was a railroad. At the hearing that followed, both the attorney and Orlando testified that Orlando did not solicit clients, but, rather, investigated the attorney's FELA cases.

Following the testimony, the Board added a new charge based on the attorney hiring Oralndo to investigate cases that involved Orlando's railroad employer.

The Board gave the attorney a continuance of several months in order to give him time to respond to the new charge.

After the trial resumed, the Board found the attorney guilty of the new charge.

When the case reached the United States Supreme Court, this Court reversed because, it held, the failure of the original charging document to charge that the attorney hired Orlando to investigate, deprived the attorney of due process:

> In the present case petitioner had no notice that his employment of Orlando would be

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(Cont'd)

of law. The Superior Court didn't have "discretion" to make such an error of law—especially when, in a quasi-criminal proceeding, the error deprives the attorney of procedural due process.

> considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F.2d at 452.
>
> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault 387 US 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. . . .
>
> How the charge would have been met had it been originally included in those leveled against the petitioner by the . . . Board . . . no one knows.
>
> The absense of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived the . . . [attorney] of procedural due process.

390 U.S. at 550-552.

The instant case is on all fours with *Ruffalo*, and is squarely governed by this Court's opinion in that case. In both cases the respondent attorney was disciplined for things that weren't charged in the charging document, but were first advanced after the trial started and the attorney testified about

the things. In *Ruffalo* this Court reversed because, it held, this cannot be done.[7]

In the instant case, the Presentment, likewise, failed to give "fair notice as to . . . the precise nature of the charges" being made under Rule 1.4.

For example, the Presentment gave no notice the Petitioner had to prepare to defend against a charge "he did

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7. In fact, this case is an even stronger case for reversal than was *Ruffalo*.

Thus, in *Ruffalo*, when the Board added the new "investigation" charge, it adjourned the hearing so the respondent attorney did have some opportunity to prepare a response, and to respond at trial, to the new charge. However, in this case the Petitioner had absolutely no opportunity to respond to the new Rule 1.4 charges—because the new charges were first raised in the Superior Court Decision (after the trial and briefing had been completed).

Also, in *Ruffalo* the new charges were not terribly different from the old charges. (I.e., Both the charge that Orlando was soliciting, and the charge Orlando was investigating, turned on what Orlando was doing during the time he was working for the attorney.) On the other hand, in this case the new charges were very different from the old charges. (I.e., The old charge, that the Petitioner didn't tell Lukken he had changed his position on his fee, so the fee was "approximately half a million dollars" more, turned on a 1997 telephone conversation that took place more than two years after the Petitioner had stopped representing Lukken.) The new charges [that the Petitioner "did no billing", that he had no communication at all with Lukken about the fee, and that not doing a fee agreement also violated Rule 1.4] concerned significantly different facts, and a different time—when the Petitioner was representing Lukken, from 1991 to 1995—two to six years before the 1997 telephone conversation.

no billings". The Presentment said nothing about billings". It gave the Petitioner absolutely no notice that he had to prepare to defend against the unusual charge that, in a contingency case, he did not submit bills.[8] In addition, at trial the trial judge questioned the Petitioner about his billing. Billing wasn't an issue raised by the Presentment. (So, as happened in *Ruffalo*, the Petitioner was trapped by, after giving testimony on matters that weren't charged in the Presentment, being held guilty of those uncharged matters on the basis of his own unwitting testimony).

Similarly, the Presentment contained no allegation that (as the Rule 1.4 part of the Decision, quoted at page 12, *supra*, holds) "from the time that . . . [the Petitioner] undertook the services he *did not confer* concerning the fee" (Decision, par. 16: underlining added). To the contrary, the Presentment alleged just the opposite—that the Petitioner *did confer* with the clients about the fee during this time![9] Manifestly, a Presentment that

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8. The out-of-the-blue holding that "[h]e did no billings" is particularly unfair because attorneys do not normally submit periodic bills in contingency cases—so the Respondent had no reason to prepare to respond to such an unusual charge. If the Respondent had been given notice of this charge, he would have (among other things) presented expert witness testimony on attorneys' bills in contingency cases.

9. Specifics of how the Presentment alleges the Petitioner did confer, were set out in the Appendix to the Petitioner's Petition to the Connecticut Supreme Court. A copy of this part of that Appendix is set out in Appendix E, hereto.

If the Presentment had given notice of this charge, the Respondent would have (among other things) focused on marshalling the evidence that showed that, during this time, he conferred about his fee on at least three different occasions (involving even more meetings). (The three occasions are described in this Petition [at page 4, second full paragraph;

(Cont'd)

alleged the Petitioner *did confer* did not give "fair notice as to . . . the precise nature of . . . [a] charge . . ." the Petitioner *did not confer.*[10]

In short, while the Petitioner was responding to the Rule 1.4 charge in the Presentment, that he didn't tell Lukken he had changed his fee, so it was "appproximately half a million dollars" more than the agreed to one-third fee (which charge focused on a 1997 telephone conversation that took place nearly two years after the Petitioner had stopped representing Lukken), the trial judge found the Petitioner gulty of different matters that weren't charged and that had taken place between 1991 and 1995, two to six years earlier, when the Petitioner was still representing Lukken. (E.g., The trial judge held [erroneously] that, while the Petitioner was representing Lukken, he violated Rule 1.4 by not conferring with Lukken about his fee, and by not billing Lukken.)[11]

(Cont'd)

page 5, run over paragraph, and page 8, second *full* paragraph]. Indeed, even the Superior Court Decision [inconsistently] mentions two of the occasions [in paragraphs 7 and 16.])

10. The other ground for the Rule 1.4 part of the Decison is, there was no "written agreement". (Decision, par. 16) While this charge was included in the Presentment, it was only included as part of the Rule 1.5(c) charge, so the Respondent had no opportunity to brief whether a failure to obtain a written fee agreement also violated Rule 1.4. (This question was critical because the Decision's holding, that the Respondent did more than violate Rule 1.5[c], enabled the Decision to impose a penalty that was much greater than the reprimand normally imposed for violating just Rule 1.5[c]).

11. Under Connecticut law, if the Petitioner didn't receive the constitutionally required notice for any one of the (three) new Rule 1.4 charges, the entire Rule 1.4 part of the Decision must be reversed—

(Cont'd)

II.

Four Reasons Why Certiorari Should Be Granted In This Case.

Certiorari should be granted in this case because:

(1) It is egregiously unfair for a court to take away a property right (i.e., an attorney's ability to earn a living by practicing law) after a trial at which: (a) the charges aren't disclosed (until after the trial, when the Decision issues); and, (b) in the absence of notice, the attorney is trapped into unwittingly providing evidence on which one of the undisclosed grounds is based.

(2) The Connecticut Supreme Court is in direct conflict with this Court on whether the Constitution requires that an attorney receive advance notice of the charges in an attorney grievance proceeding.

(3) Thirty-four years have passed since this Court decided *Ruffalo*. The failure of all three levels of the Connecticut courts to recognize and honor *Ruffalo* shows its message has dimmed.

(4) This is a particularly appropriate case to revisit *Ruffalo* because, in addition to the one new Rule 1.4

(Cont'd)
because it is impossible to determine how much of the Rule 1.4 part of the Decision rests on that one ground. *Somers v. Statewide Grievance Committee*, 245 Conn. 277, 715 A.2d 712 (1988).

For the same reason, if the Rule 1.4 part of the Decision is reversed, the entire Decision must be reversed.

ground (in the trial court Decision) on which the Petitioner (like the *Ruffalo* attorney) was trapped into giving unwitting testimony against himself (i.e., the "He did no billings" ground), on the other two new Rule 1.4 grounds the Petitioner just did not have an opportunity to respond to the undisclosed charge (i.e., the "He did not confer concerning the fee" ground and the "He [also violated Rule 1.4 by] not do[ing] . . . a written fee agreement" ground). This case presents an appropiate opportunity to show that *Ruffalo* applies in this situtation, too.

CONCLUSION

For the reasons stated above, the Petitioner respectfully prays that the Court issue a writ of certiorari to review the decision of the Connecticut Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — PRESENTMENT OF ATTORNEY

CASE TYPE CODE: M63

SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD/NORWALK
AT STAMFORD

APRIL 30, 1999

CV99-0

STATEWIDE GRIEVANCE COMMITTEE

VS.

JOHN TIMBERS

PRESENTMENT OF ATTORNEY

To the Superior Court within and for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, now in session, comes now the Statewide Grievance Committee, acting through its members duly appointed and qualified, and makes presentment to said Court that John Timbers of Stamford, Connecticut, has been guilty of misconduct, not occurring in the actual presence of the court, involving his character, integrity, and professional standing and conduct and complains and says:

1. On or about May 19, 1981, John Timbers (hereinafter, "the Respondent"), Juris #101353, was duly admitted as a member of the Bar of the State of Connecticut.

Appendix A

2. On or about March 21, 1991, in *Stamford/Norwalk Grievance Panel v. Timbers*, Grievance Complaint #89-0818, the Statewide Grievance Committee reprimanded the Respondent for violating Rule 3.5 of the Rules of Professional Conduct.

3. On or about August 15, 1991, in *Juul v. Timbers*, Grievance Complaint #90-0545, the Statewide Grievance Committee reprimanded the Respondent for violating Rules 1.1, 1.2, 1.3 and 1.4 of the Rules of Professional Conduct.

4. On or about March 18, 1999, in *Stamford/Norwalk Grievance Panel v. Timbers*, Grievance Complaint #96-0078, the Statewide Grievance Committee reprimanded the Respondent for violating Rules 1.3 and 3.2 of the Rules of Professional Conduct.

5. On or about December 18, 1996, in *Statewide Grievance Committee v. Timbers*, CV96-0152030, in the Judicial District of Stamford/Norwalk at Stamford, the Superior Court suspended the Respondent from the practice of law for one month for violating Rules 1.1 and 8.1(b) of the Rules of Professional Conduct.

6. In or about 1990, the Respondent agreed to represent Lukken Color Corporation [hereinafter "LCC"] of Greenwich, Connecticut in a patent infringement claim and related litigation.

7. LCC and the Respondent agreed that the Respondent's fee would be contingent on the outcome of the matter.

8. The contingent fee agreement was not in writing.

9. The contingent fee agreement did not provide for any fee in excess of thirty-three percent of any recovery.

10. In or about February of 1995, the litigation was settled and LCC received approximately $330,000.00.

11. In or about March of 1995, LCC paid the Respondent $80,795.00 in legal fees.

12. LCC had previously paid the Respondent approximately $11,000.00 in legal fees.

13. The Respondent endorsed and deposited the check in the amount of $80,795.00 which contained a restrictive endorsement that the payee acknowledges that this payment is full satisfaction of any and all obligations owed to the Respondent.

14. In or about December of 1996, the Respondent sued LCC and its officers for additional legal fees.

15. The Respondent claimed approximately half a million dollars in additional legal fees were owed by LCC to the Respondent.

16. The Respondent's failure to keep LCC reasonably informed about the status of his fee in the matter constituted a violation of Rule 1.4 of the Rules of Professional Conduct.

Appendix A

17. The Respondent's failure to put the contingent fee agreement in writing and the unreasonableness of the fee claimed by the Respondent constituted a violation of Rule 1.5 of the Rules of Professional Conduct.

18. On January 21, 1999, the Statewide Grievance Committee voted in *Lukken Color Corp. v. Timbers*, Grievance Complaint #96-0572, as a result of the foregoing, to file a presentment against John Timbers in Superior Court, pursuant to Connecticut Practice Book §247(a) for the imposition of whatever discipline the Court deems appropriate.

WHEREFORE, Petitioner Statewide Grievance Committee prays that an order of notice of hearing be issued to the said John Timbers notifying him to appear before the Court within sixty days for a hearing on this complaint, that costs and expenses be taxed against the Respondent, and that such proceedings may be had on this complaint as is provided by law and the rules of the Court.

Dated at East Hartford, Connecticut, this 30th day of April, 1999.

STATEWIDE GRIEVANCE COMMITTEE

By: s/ Maureen A. Horgan
Maureen A. Horgan
Assistant Bar Counsel
Second Floor – Suite Two
287 Main Street
East Hartford, CT 06118-1885
Juris #106123
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APPENDIX B — MEMORANDUM OF DECISION OF THE SUPERIOR COURT FOR THE STAMFORD/ NORWALK JUDICIAL DISTRICT AT STAMFORD DATED AUGUST 2, 2000

SUPERIOR COURT

STAMFORD/NORWALK JUDICIAL
DISTRICT AT STAMFORD

AUGUST 2, 2000

D.N. CV 99 0171925 S

STATEWIDE GRIEVANCE COMMITTEE,

VS.

JOHN TIMBERS

MEMORANDUM OF DECISION

This case comes to this court as a presentment alleging misconduct by John Timbers of Stamford, Connecticut, not occurring in the actual presence of the court involving his character, integrity and professional standing. The court finds the following facts to have been proven by clear and convincing evidence:

1. On or about May 19, 1981, John Timbers, Juris # 101353, was duly admitted as a member of the Bar of the state of Connecticut.

Appendix B

2. On or about March 21, 1991, in *Stamford/Norwalk Grievance Panel v. Timbers*, Grievance Complaint # 89-0818, the Statewide Grievance Committee reprimanded the Respondent for violating Rule 3.5 of the Rules of Professional Conduct.

3. On or about August 15, 1991 in *Juul v. Timbers*, Grievance Complaint No. 90-0545, the Statewide Grievance Committee reprimanded Attorney Timbers for violating Rules 1.1, 1.2, 1.3 and 1.4 of the Rules of Professional Conduct.

4. On or about March 18, 1999, in *Stamford/Norwalk Grievance Panel v. Timbers*, Grievance Complaint # 96-0078, the Statewide Grievance Committee reprimanded the Respondent for violating Rules 1.3 and 3.2 of the Rules of Professional Conduct.

5. On or about December 18, 1996 in *Statewide Grievance Committee v. Timbers*, CV96-0152030 Judicial District of Stamford/Norwalk at Stamford, the Superior Court suspended the respondent from the practice of law for one month for violating Rules 1.15(b) and 8.1(b) of the Rules of Professional Conduct.

6. In 1990, the Respondent agreed to represent Lukken Color Corporation of Greenwich, Connecticut in a patent infringement claim and related litigation.

7. Lukken Color Corporation and the Respondent entered into a contingent fee agreement. This is based on the testimony of Mr. Mahoney pages 14 and 15 and page 143 of the Transcript of November 16, 1999 and Veva Crozier, pages 123 through 127 of the Transcript of November 16, 1999. Both witnesses

indicated that they could not afford the hourly rates that they were paying for the litigation and that Mr. Timbers agreed to take it as a contingent matter.

Although Attorney Timbers was reluctant to use the word "contingent," the essence of his testimony, the court finds, was that if he did not recover any money from Lukken, he would not charge a fee. He also believed that they were proceeding on the basis that they were expecting to pay a fee of 1/3. Further, as part of his failure to communicate was the fact that he expected to be paid more than the 1/3. The purpose of a written agreement is to make sure among other things that the parties know what the fee is and that there is no question later on.

8. The contingent fee agreement was not in writing.

9. The contingent fee agreement did not provide for any fee in excess of 33% of the recovery.

10. On or about February of 1995, the litigation was settled and Lukken Color Corporation received approximately $330,000.

11. On or about March of 1995, Lukken Color Corporation paid the Respondent $80,795 in legal fees (See Exhibit # 1).

12. Lukken Color Corporation had previously paid the Respondent approximately $11,000 in legal fees.

13. Attorney Timbers endorsed and deposited the check (Exhibit # 1) in the amount of $80,795 which contained a

restrictive endorsement that the payee acknowledges that this is payment in full satisfaction of any and all obligations owed to the him. Mr. Timbers claims that he signed it under duress. He wanted to arbitrate the difference between what was paid and the 1/3, and they refused to do it. He was in financial straits at the time and accordingly, signed this as he claimed under duress. Court finds that he has not proven duress as alleged in his special defenses.

14. On or about December of 1996, Attorney Timbers sued Lukken Color Corporation and its officers for additional legal fees (See Exhibit 2).

15. Looking at the complaint it is difficult to tell what is claimed. The testimony of Attorney Kovacs made it clear that the claim made by Attorney Timbers in their phone call was on a quantum meruit theory done because he had no written retainer agreement. (See pages 106-07 of the Transcript of November 16, 1999.)

16. The court finds that the failure to keep Lukken Color Corporation reasonably informed about the status of his fees in the matter constituted a violation of rule 1.4 of the rules of professional conduct. It is clear from the time that Mr. Timbers undertook the services he did not confer concerning the fee. He did not do a written agreement. He did no billings. It wasn't until the case was close to settlement that any discussions took place concerning the fee.

"A lawyer shall keep a client reasonably informed about the status of matter . . ." Rule 1.4(a) of the Rules of Professional Conduct. "A lawyer may not withhold information to serve

the lawyer's own interest or convenience." Official Commentary to Rule 1.4 of the Rules of Professional Conduct. "The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule." Scope of the Rules of Professional Conduct at 3. "A lawyer should maintain communication with a client concerning the representation."

Communication with a client, regarding an attorney's fee in a matter, is not excluded from Rule 1.4 of the Rules of Professional Conduct. In another presentment, "[t]he statewide grievance committee alleged that [an attorney] . . . violated, inter alia, Rules 1.5, 1.15 and 8.4 of the Rules of Professional Conduct by failing to inform his client of the basis of his fee, by charging an excessive fee, by engaging in fraud by signing a client's check without consent and by failing to obtain [an] . . . adoption." *Statewide Grievance Committee v. Presnick*, 216 Conn. 135, 136, note 1 (1990) citing *Statewide Grievance Committee v. Presnick*, 215 Conn. 162, 164 (1990). The trial court "concluded that the defendant had violated the Rules of Professional Conduct and ordered his suspension from the practice of law for one year." Presnick at 137. Accordingly, the respondent's failure to keep his client, Lukken reasonably informed about the status of his fee in the matter of a patent claim and related litigation, constituted a violation of Rule 1.4 of the Rules of Professional Conduct.

Appendix B

17. The court finds a violation of Rule 1.5(c)

Rule 1.5(c) of the Rules of Professional Conduct provided that:

> A fee may be contingent on the outcome of the matter for which the service is rendered . . . A contingent fee agreement shall be in writing and shall state the method by which a fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(Court's Exhibit 1-A.)

The contingency fee agreement in the instant case was not in writing. (Transcript 11/16/99 pp. 15, 125 and 11/17/99 p. 8.) Attorney Timbers' failure to put the contingent fee agreement in writing constituted a violation of Rule 1.5(c) of the Rules of Professional Conduct.

As part of the summation, Attorney Timbers argued that no one was hurt as a result of this. The court finds substantial evidence to the contrary. In fact, the court finds that as a

result of this failure to have the written agreement, Attorney Timbers brought a lawsuit, the defendants had to hire an attorney they paid approximately $20,000 in legal fees and were forced to defend this case. According to Attorney Timbers' testimony, the case was dismissed at some point.

18. Special Defenses

Attorney John Timbers has filed six special defenses. The defendant has failed to sustain his burden of proof by a fair preponderance of the evidence to each of the special defenses which include the Statute of Limitations, Laches, Failure to State a Claim Under Rule 1.4, an illegal and improper presentment, duress and unclean hands.

19. A court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession. The court is entitled to take into consideration the American Bar Association's standards for imposing sanctions on lawyers. Aggravating factors may be considered. The court finds under 9.22 Aggravating Factors, which include (a) the prior disciplinary offenses set forth in this memorandum of decision; (b) the selfish motive being the endorsement of the check; (c) in addition, Attorney Timbers has been a member of the bar for approximately 19 years.

Accordingly, Attorney John Timbers is suspended from the practice of law for a period of six months, from August 15, 2000 to February 15, 2001. It is further ordered that Attorney Timbers shall apply for readmission pursuant

to the provisions of Practice Book § 2-53. As a condition of consideration for readmission, the applicant shall demonstrate participation in a course in legal ethics and law office management. Attorney Michael L. Goldman of 200 Connecticut Avenue, Norwalk, Connecticut 06854 is appointed pursuant to Practice Book § 2-64 to inventory the files of the suspended attorney and to take such action as seems indicated to protect the interest of the attorney's clients.

So Ordered.

s/ Karazin
KARAZIN, J.

Decision entered in accordance with the foregoing.

8/2/200
s/ Marja Vasa
Assistant Clerk
(TAC)

APPENDIX C — OPINION OF THE APPELLATE COURT, STATE OF CONNECTICUT DATED MAY 21, 2002

IN THE
APPELLATE COURT
OF THE
STATE OF CONNECTICUT

STATEWIDE GRIEVANCE COMMITTEE

v.

JOHN TIMBERS

(AC 21256)

Lavery, C.J. and Schaller and Peters, Js.

Argued April 2—officially released May 21, 2002

Opinion

PER CURIAM. The defendant, John Timbers, appeals from the trial court's judgment suspending him from the practice of law for a period of six months. We affirm the judgment of the trial court.

On May 26, 1999, the plaintiff, the statewide grievance, committee, filed a presentment complaint alleging misconduct against the defendant, an attorney licensed to practice law in this state. On August 2, 2000, following a hearing, the court filed a memorandum of decision and rendered judgment against the defendant. The court concluded that

the defendant had violated rule 1.4 (a)[1] of the Rules of Professional Conduct by failing to communicate with his client regarding his fee and rule 1.5 (c)[2] of the Rules of Professional Conduct by failing to secure a written contingent fee agreement with his client. In determining the appropriate sanction for the defendant's violations of the Rules of Professional Conduct, the court utilized the American Bar Association's Standards for Imposing Lawyer Sanctions (Standards).[3] Pursuant to § 9.22 of the Standards, which sets

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1. Rules of Professional Conduct 1.4(a) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

2. Rules of Professional Conduct 1.5(c) provides: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subsection (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages of the recovery that shall accrue to the lawyer as a fee in the event of settlement, trial or appeal, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

3. "Courts considering sanctions against attorneys measure the defendant's conduct against rules of professional conduct. The professional conduct of attorneys in Connecticut is governed by the Rules of Professional Conduct, as found in the Practice Book. Although Connecticut's Rules of Professional Conduct delineate what

(Cont'd)

forth aggravating factors, the court found that the defendant (1) previously had been disciplined by the plaintiff, (2) had acted in a selfish manner and (3) had been a member of the Connecticut bar for approximately nineteen years. The court suspended the defendant from the practice of law from August 15, 2000, to February 15, 2001. The defendant thereafter appealed.

On appeal, the defendant claims that the court improperly (1) denied his motion for articulation,[4] (2) concluded that he did something more than violate rule 1.5 (c) by violating rule 1.4 (a) and (3) imposed a penalty of six months suspension from the practice of law.

"In presentment proceedings, the statewide grievance committee must prove by clear and convincing evidence that the attorney engaged in misconduct in violation of the Rules of Professional Conduct. See *Statewide Grievance Committee v. Whitney*, [227 Conn. 829, 838, 633 A.2d 296 (1993)].

(Cont'd)

is improper conduct, they do not provide guidance for what sanctions are appropriate for the particular conduct. For this reason, Connecticut courts reviewing attorney misconduct have looked to the American Bar Associations Standards for Imposing Lawyer Sanctions . . . which do provide guidance as to what disciplinary sanctions are appropriate." *Statewide Grievance Committee v. Spirer*, 46 Conn. App. 450, 463-64, 699 A.2d 1047 (1997), rev'd on other grounds, 247 Conn. 762, 725 A.2d 948 (1999).

4. We need not address that claim because whether there was a need for the trial court to articulate its decision was resolved by this court's ruling with respect to the defendant's request to file a late motion for articulation.

Appendix C

The trial court conducts the presentment proceeding de novo. See *Statewide Grievance Committee v. Presnick*, 215 Conn. 162, 167, 575 A.2d 210 (1990). In determining whether an attorney violated the Rules of Professional Conduct and the appropriate sanction to impose, the trial court possesses a great deal of discretion. See *Statewide Grievance Committee v. Presnick*, 216 Conn. 127, 131, 577 A.2d 1054 (1990); *Grievance Committee v. Nevas*, 139 Conn. 660, 666, 96 A.2d 802 (1953). When the trial court determines that an attorney committed misconduct in violation of the Rules of Professional Conduct, unless it clearly appears that [the attorney's] rights have in some substantial way been denied him, the action of the court will not be set aside upon review. . . . *Statewide Grievance Committee v. Presnick*, supra, 216 Conn. 132, quoting *In re Durant*, 80 Conn. 140, 150, 67 A. 497 (1907)." (Internal quotation marks omitted.) *Statewide Grievance Committee v. Egbarin*, 61 Conn. App. 445, 453, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001).

We have reviewed the proceedings in the trial court and, after considering the briefs and arguments of the parties, we conclude that the court's findings and the penalty imposed on the defendant were well within the court's discretion.

The judgment is affirmed.

APPENDIX D — OPINION OF THE SUPREME COURT, STATE OF CONNECTICUT DATED JULY 11, 2002

STATEWIDE GRIEVANCE COMMITTEE

v.

JOHN TIMBERS

Decided July 11, 2002

The defendant's petition for certification for appeal from the Appellate Court, 70 Conn. App. 1 (AC 21256), is denied.

SULLIVAN, C. J., and NORCOTT, J., did not participate in the consideration or decision of this petition.

APPENDIX E — EXCERPT FROM THE APPENDIX TO THE PETITIONER'S PETITION FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

THE PRESENTMENT ALLEGED THE RESPONDENT *DID CONFER* ABOUT HIS FEE

One reason the Presentment didn't give full and fair notice that it was charging that ". . . from the time that . . . [the Respondent] undertook the services *he did not confer* concerning the fee" (underlining added) is that the Presentment charged just the opposite—that the Respondent *did confer* concerning the fee during this time!

Thus, the Respondent first "undertook the services" in the *Lukken v Valspar* litigation at the request of Kevin McGovern, Esq., who was then representing the clients in the litigation. Pursuant to an agreement between McGovern, the clients, and the Respondent, the Respondent submitted his bills (which were on an hourly basis) to McGovern, who then included them in his bills to the clients.

After approximately six months under this arrangement, the clients told McGovern they could no longer afford to pay his hourly charges. A series of meetings was then held (involving McGovern, the clients, and the Respondent) during which it was agreed that the Respondent would take over the *Lukken v Valspar* litigation on a contingent basis. (See Decision, par. 7)

Thus, the following presentment allegations refer to a series of conferences that took place approximately six months after ". . . the Respondent undertook the services":

Appendix E

"6. In or about 1990, the Respondent agreed to represent Lukken . . . in a patent infringement claim and related litigation.

"7. [Lukken] and the Respondent agreed that the Respondent's fee would be contingent on the outcome of the matter."

It goes without saying that, to reach such an agreement on a fee, the Respondent and the clients had to confer.

* * * *